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No. 09-377

Supreme Court, U.S.
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In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LAUREL BAYE HEALTHCARE
OF LAKE LANIER, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether Section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), authorizes the National Labor Relations Board to act when only two of its five positions are filled, if the Board has previously delegated its full powers to a three-member group of the Board that includes the two remaining members.

CORPORATE DISCLOSURE STATEMENT

Laurel Baye Healthcare of Lake Lanier, Inc. certifies that it has no parent companies and there are no publicly-held companies having a 10 percent or greater ownership interest in the corporation.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 564 F.3d 469. The decision and order of the National Labor Relations Board ("Board") is reported at 352 N.L.R.B. 179.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2009. The Board's petitions for rehearing and for rehearing en banc were denied on July 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Section 3 (b) of the National Labor Relations Act, 29 U.S.C. § 153 (b) is set forth below:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

STATEMENT OF CASE

On December 16, 2007, the term of Board Chairman Robert J. Battista expired, leaving four members of the Board. On December 20, 2007, the Board, acting through its remaining four members temporarily delegated all of its powers to Members Liebman, Schaumber, and Kirsanow, acting as a three-member group. This temporary delegation, which was effective December 28, 2007, was made in anticipation of the impending expiration of the recess appointments of Members Kirsanow and Walsh at the expiration of the then-current session of Congress and the substantial likelihood that because of disagreements between the President and the Senate, no new Board members would be confirmed until after a new President took office in 2009. The Board acted with the specific intent that Members Liebman and Schaumber would continue to issue decisions and orders as a de-facto two-member panel. The recess appointments of Members Walsh and Kirsanow did expire on December 31, 2007, and since January 1, 2008, the Board has been functioning with two members, Liebman and Schaumber.

On February 29, 2008, asserting that they were acting as a quorum of the three-member group that purported to include the previously-departed Member Kirsanow, Chairman Schaumber and Member Liebman issued a Decision and Order finding that Laurel Baye Healthcare of Lake Lanier, Inc., Respondent herein, had committed violations of §§ 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (5). The Board ordered affirmative relief.

Respondent subsequently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-petition seeking enforcement of its order. At the request of all parties, the D.C. Circuit designated this case as the lead case and expedited oral argument, which was held on December 4, 2008. On May 1, 2009, a panel of the D.C. Circuit (Chief Circuit Judge Sentelle, Circuit Judge Tatel, and Senior Circuit Judge Williams) issued a unanimous opinion granting the petition for review and denying the Board's cross-application for enforcement.

The D.C. Circuit found it unnecessary to decide whether the Board's delegation of powers to a three-member group, knowing that only two would remain to decide cases, was a "sham," as it concluded that the case could be resolved on the basis of the Board's lack of a quorum. The court focused on the statutory requirement for a three-member quorum "at all times" and rejected the Board's contention that the two-member quorum of a three-member group was an "exception" that effectively overrode the three-member quorum requirement.

In rejecting the Board's argument, the court of appeals explained:

> Specifically, the Board's position ignores the requirement that the Board quorum requirement must be satisfied "*at all times*." 29 U.S.C. § 153(b) (emphasis added). Moreover, it ignores the fact that the Board and delegee group quorum requirements are not mutually exclusive. The delegee group quorum provision's language does not eliminate the requirement

> that a quorum of the *Board* is three members. Rather, it states only that the quorum of any three-member *delegee group* shall be two. Id. The use of the word "except" is therefore present in the statute only to indicate that the delegee group's ability to act is measured by a different numerical value. *See* id. The Board quorum requirement therefore must still be satisfied, regardless of whether the Board's authority is delegated to a group of its members. Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied. Id. But the Board cannot by delegating its authority circumvent the statutory Board quorum requirement, because this requirement must always be satisfied.

Id. at 472-473.

The court, citing the Restatement (Third) of Agency § 3.07(4) (2006), noted that "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Id.* at 473. The court thus concluded:

> In the context of a board-like entity, a delegee's authority therefore ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum. It must be remembered that the delegee committee does not act on its own behalf. The statute confers no authority on such a body; it

> only permits its creation. The only authority by which the committee can act is that of the Board. If the Board has no authority, it follows that the committee has none. The delegee's authority to act on behalf of the Board therefore ceased the moment the Board's membership dropped below its quorum requirement of three members.

Id.

The Board filed timely petitions for rehearing and rehearing en banc. The court of appeals denied these petitions on July 1, 2009. On September 29, 2009, the Board filed its petition for writ of certiorari.

ARGUMENT

The court of appeals correctly interpreted section 3(b) as not authorizing the Board to continue to issue decisions and orders in unfair labor practice and representation cases with only two sitting members. The court of appeals properly rejected the Board's contention that the prior delegation of powers to a three-member group authorized the Board to continue to issue decisions and orders when the Board's membership dropped below its statutory quorum of three members.

Although the court of appeals properly construed § 3(b), as the Board points out in its petition and as is set out more fully below, there is a split among the circuit courts that warrants definitive resolution by this Court. For that reason only, Respondent does not oppose the granting of the petition for certiorari. However, Respondent does oppose the ultimate relief

sought by the Board and requests that the Court affirm the court of appeals.

Respondent further opposes the Board's suggestion that because a petition for writ of certiorari is currently pending in *New Process Steel, LP v. NLRB,* No. 08-1457 (U.S. filed May 22, 2009), the "Court should therefore hold the Board's petition in this case pending its disposition of *New Process.*" Board Petition at 9. Rather, the appropriate course of action is for the Court to either grant or deny both petitions. If the Court decides to grant both petitions, the appropriate course of action is to consolidate the cases for briefing and oral argument.

I. THE FOUR COURTS THAT HAVE CONSIDERED THE TWO-MEMBER BOARD ISSUE HAVE APPLIED FOUR UNIQUE ANALYSES.

As of this date, in addition to the decision of the court of appeals in *Laurel Baye,* three other courts of appeals have addressed the issue of the Board's power to issue decisions and orders with only two sitting members. Although the score card currently rests at three to one in favor of the Board's power to issue two-member decisions, all four courts have followed distinct analytical approaches.

A. The First Circuit's Analysis

On March 13, 2009, the United States Court of Appeals for the First Circuit issued its decision in *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (petition for certiorari pending), finding that the Board was empowered to issue two-member

decisions. The court's analysis was short and failed to discuss the import of the provision in § 3(b) that the Board's quorum was "at all times" three members:

> The Board's delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b). First, section 3(b) allowed the Board to delegate all of its powers to a three-member group. Second, the statute states that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board." The vacancy, which left the two-member quorum remaining, may not, under the terms of section 3(b), impair the right of the two-member quorum to exercise all powers of the Board.

Id. at 41.

B. The Seventh Circuit's Analysis

On the same day that the D.C. Circuit issued its decision in *Laurel Baye,* the United States Court of Appeals for the Seventh Circuit issued its decision in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009). Like the First Circuit, the court gave no consideration to the import of the § 3(b) mandate that "three members of the Board shall, at all times, constitute a quorum of the Board," choosing to focus instead on the vacancies and delegee group quorum provisions. The court concluded:

> The NLRB argues that the statute at issue is clear that the vacancy of one member of a three

> member panel does not impede the right of the remaining two members to execute the full delegated powers of the NLRB. As the NLRB delegated its full powers to a group of three Board members, the two remaining Board members can proceed as a quorum despite the subsequent vacancy. This indeed is the plain meaning of the text. As we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Id. at 845-846.

Although the Seventh Circuit was of the view that the meaning of the statutory language was "plain" and that resort to legislative history was unnecessary, it nevertheless found that the legislative history failed to affirmatively support the employer's proffered interpretation of the statute. *Id.* at 847. Finally, the court rejected the contention that the Board panel was not properly constituted because it failed to include three members at the time the case was assigned to the panel. *Id.* at 848.

C. The Second Circuit's Analysis

The Second Circuit also confronted this issue in *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410 (2d Cir.

2009 (petition for certiorari pending). Well in advance of issuing its decision, the Second Circuit had the benefit of the three court decisions described above. After reviewing these decisions, the court of appeals candidly acknowledged the divergent approaches:

> To summarize, one of our sister circuits—the Seventh Circuit—has upheld a decision by the two-member NLRB panel based on the "plain meaning" of section 3(b) of the Act, noting that its interpretation comports with the legislative history of relevant amendments to the Act, without discussing principles of agency (i.e. principal-agent) law. [citation omitted] Another of our sister circuits—the D.C. Circuit—has overturned a decision by the same two-member panel based on the plain language of section 3(b) of the Act, noting that its interpretation comports with applicable principles of agency law, but without discussing the applicable legislative history. [citation omitted] A third sister circuit—the First Circuit—has concluded that the "plain text" of the Act authorized the decisions by the same two-member panel, without either discussing the legislative history or relevant principles of agency law. [citation omitted]
>
> The question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court. In the meantime, we must make a determination in the present case.

(App. 18-19).

The court of appeals then deepened the existing split by applying the two-step analysis of *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an analysis that the Board had never suggested was appropriate. Following this approach, the court of appeals first addressed whether the meaning of section 3(b) was "plain." The court of appeals agreed with the First Circuit that the initial delegation of powers to a three-member panel, knowing that only two would remain to decide cases, was not improper. 568 F.3d at 419. Next, the court of appeals agreed with the D.C. Circuit that the Board's statutory quorum of three members must be satisfied "at all times," but concluded that this did "not answer the precise question presented here: once the Board has lost its quorum, what happens to a panel that was duly constituted before the Board lost its quorum?" *Id.* at 420. Further, whereas the D.C. Circuit had relied upon principal/agency law to conclude that the delegee group lost its power when the Board lost its quorum, the court of appeals chose to look to the pertinent legislative history. *Id.* at 420-422. After reviewing in some detail the legislative history of Taft-Hartley, the court of appeals concluded that this legislative history "lacks any clear statement of intent regarding the jurisdiction of a plenipotentiary panel where the Board loses its quorum—the precise question that we face in this case." *Id.* at 423.

Having concluded that the statutory language was ambiguous, the court of appeals turned to step two of the *Chevron* analysis, whether the Board's interpretation was a reasonable interpretation to which the court of appeals was required to defer. Under this deferential standard of review, the court of appeals concluded that although the D.C. Circuit's

view was "reasonable," the Board's interpretation was also "reasonable" and thus should be upheld. *Id.* at 423-424.

II. THIS CASE SHOULD BE CONSOLIDATED WITH NEW PROCESS STEEL FOR BRIEFING AND ARGUMENT.

Contrary to the Board's suggestion, it would be highly inappropriate for the Court to decide the issue presented solely in the context of the petition filed by New Process Steel. The Board is not merely asking that the Seventh Circuit's decision in *New Process Steel* be affirmed. It is asking this Court to reverse the D.C. Circuit's decision in *Laurel Baye Healthcare*. Respondent is the party who obtained the decision in *Laurel Baye* and it has a substantial interest in defending and preserving that decision. Respondent desires the opportunity to participate fully as a party in interest in the case if the Court decides to take up the issue presented. The Court should not consider the Board's request to reverse *Laurel Baye* without active participation by Respondent.

Consolidation of cases presenting the same issue is not unusual. *E.g., Employment Division, Department of Human Resources v. Smith,* 485 U.S. 660, 663, n. 4 (1988) ("Raising identical legal issues and presenting almost identical facts, these two cases proceeded in tandem through state administrative proceedings and through the state courts. They were consolidated upon order of this Court when the State's petitions for certiorari were granted); *Traynor v. Turnage,* 480 U.S. 916 (1987) (granting and consolidating petitions for writ of certiorari to the Second and District of Columbia Circuits); *Commissioner of Internal Revenue*

v. Engle, 459 U.S. 722 (1983) (consolidating separate petitions for writs of certiorari to Seventh and Federal circuits).

The Board's petition in this case was filed the same day it responded to the petition in *New Process Steel*. The respective decisions of the District of Columbia and Seventh Circuits were issued on the same day. The analyses of the two courts are quite different, and the Court would be aided in its decision making process by having both cases briefed and argued together.

CONCLUSION

For the reasons stated herein, Respondent contends that the decision of the court of appeals should be affirmed, but does not oppose the granting of the petition given the sharp split among the circuits. Respondent affirmatively opposes deferral of any decision on the Board's petition. Respondent requests that the Court consider and either grant or deny the Board's petition. If the Court grants the petition of the Board in this case and of the employer in *New Process Steel*, the two cases should be consolidated for briefing and oral argument.

Respectfully submitted,

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